

University of Miami Law School Institutional Repository

University of Miami Law Review

2-1-1953

Torts -- Determination of Respondeat Superior Under Federal Tort Claims Act

Follow this and additional works at: <http://repository.law.miami.edu/umlr>

Recommended Citation

Torts -- Determination of Respondeat Superior Under Federal Tort Claims Act, 7 U. Miami L. Rev. 275 (1953)
Available at: <http://repository.law.miami.edu/umlr/vol7/iss2/24>

This Case Note is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

ing to accept compensation,²¹ need not find himself at the mercy of the employer or compensation insurer, as he did prior to the amendment.²²

In the past the employee was frequently forced to accept compensation in order to pay debts that had arisen from the injury. Because of the election he might find himself dealing with an insurance carrier, who was not only the compensation carrier, but who also carried the liability insurance for the third person. When a situation of this nature would arise, the carrier would be interested in settling for or collecting the smallest sum possible, provided the amount recovered amounted to the extent of its payment as compensation insurer to the injured employee. Now, without forfeiting his compensation benefits, the employee may attempt to be fully compensated in damages from the third person, including such elements of damage as pain and suffering, mental anguish or loss of consortium, which are not covered by the Workmen's Compensation Law.²³

TORTS — DETERMINATION OF RESPONDEAT SUPERIOR UNDER FEDERAL TORT CLAIMS ACT

A United States Army corporal stationed on Guam was issued a trip ticket authorizing him to use a weapons carrier for official business. The corporal used the vehicle for unofficial purposes and injured plaintiff. *Held*, that under the Federal Tort Claims Act,¹ to determine the scope of employment the courts look to Federal law and decisions. Local law is used only to determine tort liability. *Williams v. United States*, 105 F. Supp. 208 (N.D. Cal. 1952).

The purpose of the Federal Tort Claims Act² is to give persons having claims against the United States the right to bring suit.³ The difficulty arises in the interpretation of Section 1346(b), which allows claims where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.⁴ It is accepted that local law should be used to determine the negligence of the governmental employee,⁵ but the courts differ as to which law determines

21. See note 5 *supra*.

22. For analysis of FLA. STAT. § 440.39 (1951) prior to amendment see Note, 1 U. OF FLA. L. REV. 278-283 (1948).

23. FLA. STAT. c. 440 (1951).

1. 28 U.S.C. § 1346(b) (1946). The district courts . . . shall have exclusive jurisdiction of civil actions . . . against the United States . . . arising from . . . the negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accord with the law of the place where the act or omission occurred.

2. 28 U.S.C. § 1346(b) (1946).

3. *United States v. Campbell*, 172 F.2d 500 (5th Cir. 1949).

4. 28 U.S.C. § 1346(b) (1946).

5. *Feres v. United States*, 340 U.S. 135 (1949); *United States v. Sharpe*, 189 F.2d 239 (4th Cir. 1951).

the master-servant relationship. Every tort action against the United States involves this relationship. The following rules have been promulgated. They are: *first*, federal decisional law should determine *respondent superior*;⁶ *second*, the act itself (with reference to armed services) in a subsequent section,⁷ defines the relationship;⁸ *third*, local law should determine the scope of employment without using peculiar local remedial law;⁹ and *fourth*, local law should be used without qualification.¹⁰

The advocates of the first theory have said that the act¹¹ itself expressly requires federal, rather than local law, to determine the master-servant relationship.¹² Another rationale of this theory held there was no express declaration on the point but that it was not reasonable to suppose that Congress intended to subject internal relationships (of the armed forces) to the law of negligence as laid down by the courts of the several states.¹³ The United States Supreme Court held that diversity of state laws and defenses to *respondent superior* led it to adopt a uniform system of federal decisional law rather than a "hodge-podge" of conflicting local law.¹⁴ The same Court disallowed the applicability of *Erie v. Tompkins*¹⁵ and held that it had no effect to bring within the governance of state law matters exclusively federal. No relationship between the government and its citizens is more distinctively federal than that between it and members of the armed services.¹⁶

With reference to the second rule other courts were content to say that Section 2671 of the Act¹⁷ resolved the question.¹⁸ This section states that acting within the scope of employment as applied to military or naval forces means acting within the line of duty and the courts looked to Army Regulations¹⁹ to define "within the line of duty."²⁰

6. *Feres v. United States*, 340 U.S. 135 (1949); *United States v. Standard Oil Co.*, 332 U.S. 301 (1947); *United States v. Sharpe*, 189 F.2d 239 (4th Cir. 1951); *Jefferson v. United States*, 178 F.2d 518 (4th Cir. 1949).

7. 28 U.S.C. § 2671 (1946) (acting within the scope of his office or employment in the case of a member of the military forces of the United States, means acting in the line of duty).

8. *Cannon v. United States*, 84 F. Supp. 820 (N.D. Cal. 1949). *Cerri v. United States*, 80 F. Supp. 831 (N.D. Cal. 1948); *Rutherford v. United States*, 73 F. Supp. 867 (E.D. Tenn. 1947).

9. *Long v. United States*, 78 F. Supp. 35 (S.D. Cal. 1948); *Kohn v. United States*, 75 F. Supp. 689 (N.D. Cal. 1948).

10. *Murphy v. United States*, 179 F.2d 743 (9th Cir. 1950); *United States v. Eleazer*, 177 F.2d 914 (4th Cir. 1949); *Olson v. United States*, 175 F.2d 510 (8th Cir. 1949); *Hubsch v. United States*, 174 F.2d 7 (5th Cir. 1949); *United States v. Campbell*, 172 F.2d 500 (5th Cir. 1949).

11. 28 U.S.C. § 1346(b) (1946).

12. *United States v. Sharpe*, 189 F.2d 239 (4th Cir. 1951).

13. *Jefferson v. United States*, 178 F.2d 518 (4th Cir. 1949).

14. *Feres v. United States*, 340 U.S. 135 (1949).

15. 304 U.S. 64 (1938).

16. *United States v. Standard Oil Co.*, 332 U.S. 301 (1947).

17. 28 U.S.C. § 2671 (1946).

18. *Cerri v. United States*, 80 F. Supp. 831 (N.D. Cal. 1948); *Rutherford v. United States*, 73 F. Supp. 867 (E.D. Tenn. 1947).

19. Sections 40-590.

20. *Cannon v. United States*, 84 F. Supp. 820 (N.D. Cal. 1949).

In adopting local law under the third rule to determine the relationship, some courts were hesitant to incorporate all local remedial law in conflict with the Act itself.²¹ Local remedial law, such as the "permissive use" statutes,²² was held to be outside the intent of the Congress, and claims arising under local law imposing liability upon an employer for conduct of an employee outside the scope of his employment were not embraced within the waiver of sovereign immunity.²³

Proponents of the last rule, that *all* local law should be applied, claim that the purpose of the act is to make the United States liable to third persons for acts of its employees under the same circumstances as those under which private persons would be liable for the same acts of their employees, in full accordance with the law of the place where the injury occurred. There can be no liability of the federal government unless the employee was both negligent and within the scope of his employment, and that entire "liability" under the act must be predicated on the "liability" of the law of the place where the injury occurred.²⁴

The first view is the most widely followed, yet it seems the least sound. The courts in support cite *Tarbles Case*²⁵ which reiterates the independent nature of the governments of the states and the government of the United States as to their respective spheres of action. Other cases analogize decisions on the National Bank Act, which was held to be only federal in nature, and therefore not within the purview of state law.²⁶ In both instances, however, there is no statute which expressly creates liability in accordance with the law of the place where the act or the omission occurred.²⁷ These courts plead "uniformity of decisions"²⁸ in relation to *respondeat superior*, yet in the same plea admit that state law should determine negligence. There is as much, if not more, diversity in the law of negligence as there is in the law governing the master-servant relationship. It is claimed that the relationship between the government and members of its armed forces is distinctively federal in character;²⁹ but *all* relationships involved in the federal employment are distinctively federal in this sense. Certainly the Tort Claims Act does not expressly make such a distinction.

If the United States is to be liable the employee must be both negligent

21. *Kohn v. United States*, 75 F. Supp. 689 (N.D. Cal. 1948).

22. CALIFORNIA VEHICLE CODE § 402 (1935).

23. *Long v. United States*, 78 F. Supp. 35 (S.D. Cal. 1948).

24. *Murphey v. United States*, 179 F.2d 743 (9th Cir. 1950); *United States v. Eleazer*, 177 F.2d 914 (4th Cir. 1949); *Olson v. United States*, 175 F.2d 510 (8th Cir. 1949); *Hubsch v. United States*, 174 F.2d 7 (5th Cir. 1949); *United States v. Campbell*, 172 F.2d 500 (5th Cir. 1949).

25. 13 Wall. 397 (1871).

26. *National Metropolitan Bank v. United States*, 323 U.S. 454 (1945); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447 (1942); *Royal Indem. Co. v. United States*, 313 U.S. 289 (1941); *Deitrich v. Greanery*, 309 U.S. 190 (1940).

27. 28 U.S.C. § 1346(b) (1946).

28. *Feres v. United States*, 340 U.S. 135 (1949).

29. *United States v. Standard Oil Co.*, 332 U.S. 301 (1947).

and within the scope of his employment. The statute, in imposing liability, did not divorce the master-servant relationship from the negligence liability. The act says liability "according to the law of the place"³⁰ and the courts ought to so enforce it. If the courts deem it an incursion into the federal sphere, the remedy lies with Congress and not in judicial legislation.

TORTS—WORKMEN'S COMPENSATION STATUTE—STATUS OF UNLAWFULLY EMPLOYED MINOR

Parents of deceased nine-year-old *unlawfully*¹ employed child brought an action under the wrongful death statute.² Defendant pleaded that the exclusive remedy is under the Workmen's Compensation Statute.³ *Held*, a child who could not be lawfully employed is not an employee under the Workmen's Compensation Statute,⁴ and therefore, the action under the wrongful death statute is not barred. *Smith v. Arnold*, 60 So.2d 281 (Fla. 1952).

There are essentially three different types of statutory provisions relating to minors in the existing workmen's compensation laws.⁵ In the first category, only minors who are legally permitted to work are included. The courts generally hold that the child's employment must not violate any child labor law provision in order to come under the act.⁶ The second type of statute does not mention minors specifically but includes all employees under a contract of hire.⁷ Though some courts at first were reluctant to include minors illegally employed,⁸ the tendency has been to include them because there exists a voidable contract of employment which a minor, who has committed no wrong, may assert for his own benefit.⁹ Other courts add that minors should be entitled to the beneficial effects

30. 28 U.S.C. § 1346(b) (1946).

1. FLA. STAT. § 450.03 (1951).

2. FLA. STAT. §§ 768.01, 768.02, 768.03 (1951).

3. FLA. STAT. c. 440; § 440.11 (1951).

4. FLA. STAT. § 440.02 (2) (1951) (which defines employee as "including minors whether lawfully or unlawfully employed").

5. See Comment, *Recovery Under Workmen's Comp. Act for Death of a Minor*, 7 MONT. L. REV. 82 (1946).

6. *Messmer v. Industrial Board*, 282 Ill. 562, 118 N.E. 993 (1918); *Kruczkowski v. Polonia Publishing Co.*, 203 Mich. 211, 168 N.W. 932 (1918); *Westerlund v. Kettle River Co.*, 137 Minn. 24, 162 N.W. 680 (1917); *Acklin Stamping Co. v. Kutz*, 98 Ohio St. 61, 120 N.E. 229 (1918); *Ortega v. Salt Lake Wet Wash Laundry*, 156 P.2d 885 (Utah 1945) (minor working in a prohibited occupation).

7. See note 5 *supra*.

8. *Widdoes v. Laub*, 33 Del. 4, 129 Atl. 344 (1925); *Sechlich v. Harris-Emery Co.*, 184 Iowa 1025, 169 N.W. 325 (1918); *Hetzel v. Wasson Piston Ring Co.*, 89 N.J.L. 205, 98 Atl. 308 (1916); *Rock Island Coal Mining Co. v. Gilliam*, 89 Okla. 49, 213 Pac. 833 (1923); *Gilley v. Aetna Life Ins. Co.*, 35 S.W. 136 (Texas 1931) (employment contract in violation of child labor law not valid).

9. *Greenberg v. Guliano*, 131 Conn. 157, 38 A.2d 436 (1944); *Pierce's Case*, 267 Mass. 140, 166 N.E. 636 (1929); *Noreen v. William Vogel and Bros.*, 231 N.Y. 317, 132 N.E. 102 (1921); *Kociolowicz v. Tonawanda Corrugated Box Co.*, 252 App. Div. 716,